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Attorneys

Judges Vow Renewed Crackdown on Attorney Discovery Abuses

BY BRUCE KAUFMAN

Recent judicial threats of big-dollar monetary sanctions against attorneys who use boilerplate discovery responses may indicate a renewed effort to crack down on obstructionist tactics in civil cases in federal court.

Some attorneys and legal experts interviewed by Bloomberg BNA say the additional judicial scrutiny to this expensive and time-consuming part of the discovery process is long overdue and, if pursued on a much wider basis, could eventually result in more streamlined, efficient and economical litigation.

But other attorneys interviewed said that, despite the threat of high sanctions, any real change to the boilerplate practice is unlikely.

They cite a host of major obstacles including long-established norms governing how cases are litigated, the billable-hour model and other factors like the fear of waiving legal arguments and what it means to be a ''zealous advocate.''

And then there are the judges themselves: a group that, as a whole, has been less than diligent in pressing the issue.

Shot Across the Bow In what was viewed as a warning shot to offending attorneys, Judge Mark Bennett of the Northern District of Iowa issued a ruling in March lambasting ''repetitive discovery objections'' that are ''devoid of individualized factual analysis.''

He called boilerplate discovery responses a ''menacing scourge'' that demands substantial monetary sanctions.

While attorneys sometimes get sanctioned for such practices, monetary sanctions are rare, big-dollar sanctions even rarer.

Bennett's comments about the common but wasteful litigation practice echoed those of Judge Andrew Peck of the Southern District of New York in a ruling issued just a few weeks earlier.

Peck said that in future cases in his court, any discovery response would be deemed waived that does not comply with a 2015 procedural rule change requiring specificity in objections.

Peck told Bloomberg BNA that boilerplate responses are ''still an annoying problem'' despite the changes to Rule of Civil Procedure 34.

Those changes make clear that judges can award the opponent's attorneys' fees as a sanction for boilerplate objections and responses.

Now, ''it's time to get tougher'' than just educating the bar about the problem, Judge Peck said.

Asked if other judges should emulate Judge Bennett's hard line approach, Judge Peck offered an emphatic response: ''YES. YES. YES.''

The problem is that boilerplate—or generalized—discovery objections make the responses effectively meaningless and create a barrier to using the responses productively, defense attorney Michael Lowry told Bloomberg BNA.

''They increase the time to case disposition, increase the expense and increase the frustration that clients already have with the civil litigation process,'' said Lowry, a partner at Wilson Elser in Las Vegas, who frequently blogs about civil discovery.

Defense attorney Douglas G. Smith of Kirkland & Ellis LLP in Chicago told Bloomberg BNA that comments like those from Judge Bennett and Judge Peck ''seem to be ratcheting up the scrutiny on this issue.''

''Such decisions may provide an incentive to be more forthcoming initially, which in the long run may reduce the work for courts in having to sort out disputes over obstructionist objections,'' he said.

But other attorneys said that ingrained cultural barriers, financial incentives to maximize billable hours, and conditioned responses will make change extremely difficult.

Lowry said that despite Judge Bennett's and Judge Peck's recent, tough stances against the practice, the judiciary, as a whole, is a major impediment to rapid progress.

Judges on this issue in general, he said, are ''too often unwilling to participate in a process of changing a behavior about which they complain.''

Sanctions expert Gregory P. Joseph of Joseph Hage Aaronson in New York agreed. Despite the mandatory nature of Rule 34, judges ''sometimes don't act like they feel required'' to actually impose sanctions, he said.

Smith also pointed to a potential downside of sanctions being imposed more routinely for discovery violations: Lawyers may bring requests for sanctions in order to gain an advantage in litigation even though the requests for sanctions may not be fully warranted.

Possible remedies ''may not fully reduce the time and effort spent on such activities to the extent they could encourage litigants to engage in satellite litigation regarding improper objections to discovery and whether sanctions should be imposed,'' Smith said.

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Wasteful Practices Persist Discovery disputes, including those caused by boilerplate responses, are by far the most common issue that requires a judge's attention, and they are the ''most common reason for the delay in civil cases,'' plaintiff's attorney Max Kennerly of Kennerly Loutey in Philadelphia told Bloomberg BNA.

The 2015 amendments to the Rules of Civil Procedure targeted two undesirable and intertwined practices: boilerplate discovery requests and boilerplate responses, Steven S. Gensler, a professor at the University of the Oklahoma College of Law in Norman, Oklahoma, told Bloomberg BNA.

Gensler served as a member of the United States Judicial Conference Advisory Committee on Civil Rules and is the author of ''Federal Rules of Civil Procedure: Rules and Commentary.''

The amount of monetary sanctions for boilerplate violations are up to judges, but in extreme cases could run into the tens of thousands of dollars for a ''harassing violator,'' Joseph, the sanctions' expert, told Bloomberg BNA. Joseph is the author of ''Sanctions: The Federal Law of Litigation Abuse.''

Asked why the practice persists despite the 2015 rule change, Judge Peck offered several explanations.

Some attorneys are required to use their firm's outdated forms, he said.

For others it's a ''lack of knowledge'' that the rule changed in 2015, a ''fear of waiving some hypothetical objection,'' or a general lack of knowledge as to what data the client actually possesses, Peck said.

Kennerly, the plaintiffs' lawyer, said that for lawyers on an hourly fee, ''boilerplate objections can feel like a no-brainer: they raise every argument they can think of, avoid any potential waiver, get to show the client something tangible, and they get paid to do so.''

But Lowry said the practice also persists because clients are not willing to pay to fight them.

The process of obtaining a court order on boilerplate objections is ''laborious,'' he said.

Clients often are better served by not extending discovery any further to fight boilerplate objections because it only increases the cost, Lowry said.

''Instead, economics dictates ignoring the objections and moving the case toward a trial,'' he said.

Cultural Barriers Kennerly said many attorneys are ''addicted'' to the practice of serving boilerplate objections, ''waiting for the court to rule on them, and then only engaging in real discovery after that.''

''I think the culture of boilerplate objections comes from a toxic mixture of zealous advocacy, fear of waiver, and billing incentives,'' he told Bloomberg BNA.

Professor Gensler said the practice persists because there is ''an ingrained ethos that they are not just acceptable but a part of good lawyering.''

Lawyers perceive that is it acceptable to make boilerplate objections ''in the same way that they perceive it is acceptable to reflexively assert every affirmative defense they can think of without worrying about whether there's any basis to plead them,'' Gensler said.

''Over the years, how many lawyers have been told that the goal of answering written discovery is to try to make it sound like you are responding while providing the least amount of information possible? And what are the two primary tools of evasion? Boilerplate objections and vague non-answers,'' he said.

Lowry added that attorneys are conditioned by training and the professional culture to be ''paranoid, constantly looking for tricks and traps.''

''They believe that boilerplate objections will limit exposure to tricks and traps set by opposing counsel, making it difficult to persuade attorneys to stop the practice,'' he said.

Winners and Losers If judges start to crack down on discovery abuses by issuing substantial sanctions, which side—plaintiffs or defendants--stands to gain more from this development?

A change may offer perhaps ''more for the plaintiff than the defendant, but since both sides of the versus make discovery requests, [it] should be a win for everyone to have clarity in what is being produced and what is not,'' Judge Peck said.

Professor Gensler said that if one indulges the usual assumption that defendants have more information to provide than plaintiffs, ''then it would seem to be a change that would favor plaintiffs,'' he said.

''But if you look beneath the surface, I think obstructionist practices hurt everyone—requesters and providers, plaintiffs and defendants—in the long run because so often the result is that the information that is fair game gets discovered anyway but only after the parties spend more time and money,'' he said.

''The real winners from eliminating the needless cost and delay caused by obstructionist responses are all of us, and the system,'' Gensler said.

As for the parties, eliminating boilerplate and obstructions objections will ''not magically transform civil discovery into heaven on earth, but it will make it feel less like hell,'' he said.

Kennerly, the plaintiffs' attorney, whose practice includes product liability, medical malpractice and workplace safety cases, said ''clients and the courts win if boilerplate discovery objections are eliminated.''

A ''substantial number of discovery disputes really shouldn't exist at all, and, in the end, clients pay for that with their fees and courts pay for it with their time,'' he said.

Lowry, with Wilson Elser, agreed. ''There are only winners if the practice ends,'' he said.

If the threat of sanctions works, ''I would hope to see a modest decrease in the overall time and expense incurred in written discovery,'' he said.

In addition to lessening one area that drives discovery expenses, it also may promote better client service, Lowry said.

''If attorneys may no longer assert generic objections to written discovery and only specific objections are permitted, then objecting attorneys will presumably need to better understand their client's case before being able to respond or object to written discovery,'' he said.

No matter which side may benefit more, Kennerly said that if judges plan to get strict by issuing substantial sanctions, it would be helpful to all litigants if federal judges ''made clear to parties early on that needless discovery disputes would not be tolerated.''

Alternatives to Tough Sanctions Aside from the threat of substantial sanctions, how can judges get tougher?

''Waiver of objections and/or opinions embarrassing non-compliant lawyers will work, over time,'' Judge Peck said.

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Similarly, many courts have been able to avoid discovery disputes by simply sitting down with the parties and talking through the issues before motions are filed, Kennerly said.

''A simple conversation can often distill the issues down to the ones that really matter,'' he said.

One additional way to reduce discovery obstructionism is to ''more vigorously'' enforce Rule 26's requirements, Kennerly, the plaintiffs' lawyer, said.

Under Rule 26(a)(1)(A)(ii), parties already have a duty to disclose relevant documents and electronically stored information.

''A more vigorous application of that rule would put the burden on parties to do the heavy lifting early on, thereby reducing the need for follow-up discovery at all,'' Kennerly said.

Kennerly also said he would like to see litigants agree to a package of pre-trial and trial agreements, along the lines of those championed by plaintiffs' attorney Stephen Susman of Susman & Godfrey in Houston (see below).

These agreements encourage parties to resolve disputes without feeling that one side took advantage over the other.

''These types of agreements, like a 'clawback' agreement for privileged documents, remove many of the incentives lawyers have to raise unnecessary or time-wasting objections,'' Kennerly said.

These alternative approaches ''absolutely'' work, he said.

But Will Anything Work? But, whether it's the threat of substantial actions or some other approach, most other attorneys don't seem sure that anything will really work.

''Are stocks or pillories still legal? If so, they might be an effective deterrent to boilerplate objections,'' Lowry quipped.

That threat aside, nothing will change unless more on the bench take an active role, he said.

Perhaps the solution to boilerplate objections is as Judge Bennett proposes: Draw a line in the sand and start using sanctions more frequently, he said.

''However, absent some indication from the local judiciary that it, too, shares his frustration and is willing to follow a similar path, I suspect in most circumstances clients will opt for the less expensive path rather than funding a cultural battle within the profession,'' Lowry said.

''Change is still possible, but it requires the right cases with the right facts, the right judges and enough on the line for the clients to justify the fight,'' Lowry said.

Professor Gensler said, ''The more judges that speak up and take action, the bigger the change and the faster it will happen.''

''If every judge spoke up and took action, what lawyer or law firm would dare persist?'' he said.

BY BRUCE KAUFMAN

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Sample Pre-Trial Agreement

· Discovery Disputes Will Be Resolved with a Phone Call Between Lead Counsel
· Depositions Will Be Taken by Agreement and Will Be Limited in Number and Length
· Parties Will Share the Same Court Reporter and Videographer
· Papers Will Be Served by E-Mail on All Counsel
· Documents Will be Produced on a Rolling Basis
· Each Side Will Pick Five Custodians for Production of Electronically-Stored Records
· Parties Will Ask the Court to Choose a Protective Order
· Exhibits Will Be Numbered Sequentially
· Parties Will Share the Expense of Imaging Deposition Exhibits
· Neither Side Will Be Entitled to Discovery of Communications with Counsel or Draft Expert Reports
· Production Does Not Waive the Privilege
· Each Side May Select up to 20 Documents from the Other Side's Privilege Log for In Camera Inspection